

BOOK REVIEWS

THE JUDICIAL PROCESS IN TORT CASES. By Leon Green. St. Paul: The West Publishing Co., 1931. Pp. xx, 1900.

At the very outset of his book the author points out that the title was chosen in order "to identify the subject-matter for study so that the student can hold it in focus". The subject-matter purports to answer in any particular tort case: "(1) How does the judicial process operate? (2) Why does it operate one way rather than in some other? On these two inquiries can be hung all of tort law".¹ Thus, Professor Green tersely gives the rhyme and reason for his collection of cases on the law of torts. Cannot "on these two inquiries" "be hung" *all* of law?

However, it is questionable whether one good casebook, more than any other good casebook, can answer these inquiries. States the author: "The emphasis is not upon doctrinal integrity, but upon the uses that courts make of legal theory in all its varieties".² The reviewer believes that even if the title of a book can impress a student, it cannot enlarge his understanding of the judicial function; neither can a preface as pointed as Professor Green's, nor the manner in which cases are collected. Cases are merely raw material for the laboratory of the classroom. Whether any particular purpose is to be served by analysis and synthesis—whether, indeed, the result of the experiment is to be chaos or order—depends far less upon the cases (of course, assuming that the collection has been well prepared) than upon the instructor. Professor Green goes so far as to admit that the success of his volume "is bound up with an unrelenting effort on the part of the instructor to master"³ the subject-matter. This is hardly strong enough. The very virtue of the case system lies in the fact that, *properly utilized*, it furnishes the student with an opportunity for intellectual acrobatics. And whether this mental stimulus, created by a series of diverse fact situations and diverse legal theories (which are adequately presented in any good casebook) culminates in the formation of mere dogma, or whether it creates an understanding of legal science, depends far more upon the ability and the viewpoint of the instructor than upon the arrangement of cases in the particular book used. A casebook cannot change a method of thought; cases are merely food for thought. To an instructor or student who is too pragmatic to observe "the uses that courts make of legal theory", the emphasis which Green seeks will pass unnoticed. If this person's viewpoint is to be altered, the first step is to shape his mental processes—and the second, to give him a good casebook. To serve the first purpose, nothing in writing can equal the essay form of legal literature. This the author does not ignore, advising the student to read Holmes, Cardozo, Bohlen, Frank, Wigmore, Pound, Llewellyn and his own works.⁴ To serve the second purpose, the reviewer sees no superiority in this casebook over other collections of similar materials. What's in a name?

Green's interesting analysis is based upon the following "hypothesis": "Persons Have *Interests* Which Are Subjected to *Harms* Against Which the *Judicial Process* Gives *Protection*".⁵ (Is it accidental that previously⁶ he referred to the same thought as a synthesis, rather than as the hypothesis of an analysis?) In this irreducible minimum of words is stated the fundamental concepts which

¹ Page iii.

² Page iv.

³ Page v.

⁴ *Ibid.* To these may well be added the essays of John Dickinson.

⁵ Page vii (italics the author's).

⁶ GREEN, JUDGE AND JURY (1930)3.

establish the basis for his arrangement of the materials. However, the arrangement and classification deal primarily with interests and harms. This is concrete evidence that for realization of the protection furnished by the judicial process the student must depend mainly upon other sources.

An outstanding element of the classification is the total absence of emphasis upon the distinction between intended and unintended conduct. This is surprising in view of Leon Green's admission that the line (though not always certain) between intended and unintended harms is "a beginning point"⁷ in determining responsibility in the tort field.

Further study of the arrangement raises other questions. Part One is "Interests of Personality and Property"; Topic One thereunder is "Physical Harms". Then the material is divided into chapters. That charitable organizations occupy a favored spot in the judicial heart does not seem to justify the scope of Chapter Two.⁸ Though the subject may well be individualized, much of the material therein deserves neither the space nor the individual treatment. And even though keepers of animals have been culprits in the judicial eye, the same criticism applies to Chapter Three. Animals are given practically as much space as power, telephone, telegraph, water and gas companies combined!⁹

On the other hand, the chapters entitled "Occupancy, Ownership, Development of Land", "Manufacturers, Dealers", and "Builders, Contractors, Workmen", which contain an excellent selection of cases, fully deserve the treatment accorded them by the author. However, it is regrettable that such emphasis is placed under a topic as general as "Physical Harms". In fact, this criticism must extend further: Cannot a charitable organization, a city, a power company or a telegraph company subject persons to harms of appropriation or defamation?

The chapters on "Power, Telephone and Telegraph, Water, and Gas Companies" and "Traffic and Transportation" are clearly the most unorthodox classifications for a casebook which have ever come to the reviewer's attention. The lack of orthodoxy, however, is praiseworthy if the departure facilitates presentation of the material. To a certain extent this end is accomplished; but it is submitted that the author's arrangement does as much harm as good. The student should have his attention focused less upon the fact that the defendant is a power company, than upon the problem of liability for preventing third persons from rendering aid;¹⁰ less upon the fact that the defendant is a telephone company, than upon the legal significance of an intervening act to save life or property;¹¹ less upon the fact that the defendant is a water company, than upon the duty to maintain carefully property for use by persons patronizing the defendant.¹² One case¹³ is placed in this chapter merely because a water pipe was pierced; neither plaintiff nor defendant was a utility, and the issue involved was the interest in receiving aid from a third person without interference by another. Here are found many "nice" problems of legal science, manifold factors influencing the judicial process, constant recurrence of the Böhlenesque question as to whether the game is worth the candle. The reviewer is not convinced that in thus mingling them the author achieves a desirable classification in the light of his own quest for a proper focus.

⁷ *Ibid.*, at 16.

⁸ This chapter is headed: "Surgical Operations; Treatment, Control, etc., of Sick, Disabled and Irresponsible Persons."

⁹ See Chapter Seven.

¹⁰ *Bowen & Son v. Iowa Public Service Co.*, 35 F. (2d) 616 (C. C. A. 8th, 1929); page 698 of the work under discussion.

¹¹ *Taylor v. Home Tel. Co.*, 163 Mich. 458, 128 N. W. 728 (1910); author's page 708.

¹² *Duteny v. Pennichuck Water Co.*, 84 N. H. 65, 146 Atl. 161 (1929); author's page 717.

¹³ *Concordia Fire Ins. Co. v. Simmons Co.*, 167 Wis. 541, 168 N. E. 199 (1918); author's page 728.

In the chapter on "Traffic and Transportation" are found the following topics: the legal significance of intervening conduct; contributory negligence, comparative negligence, the "last clear chance doctrine"; duties to trespassers, licensees; "imputed" negligence; violation of legislative enactments; the "family purpose doctrine"; causation—and many others. What material is thereby identified "for study so that the student can hold it in focus"? The greatest sin is committed respecting *Ploof v. Putnam* and *Palsgraf v. Long Island R. R.* These cases stir the legal mind to thoughts extending far beyond the facts of water travel and passenger transportation; in each is reflected the entire romance of the law. The *Palsgraf* case—which stands as a monument to the work of Cardozo and the Court of Appeals of New York—reveals the judicial process in the entire field of negligence. It seems a sacrilege to emphasize it from the narrow standpoint of passenger transportation, as does Professor Green.

Topic One of Part Two is "Harms of Physical Impairment, Appropriation, and Defamation". The five chapters thereunder deal respectively with family, social, professional, political and trade relations. More than one-half of the entire topic is devoted to defamation, but the classification makes no attempt to distinguish between this and the other forms of harm. The reviewer submits that this is erroneous. When student, practitioner or *judge* is faced with a libel case he wishes to know whether the statement is libelous, whether it is libelous *per se*, whether it has been published, what evidence is sufficient to constitute truth or justification, whether the statement is privileged, whether the privilege has been abused if it is conditional, what damages are recoverable, what evidence is admissible in mitigation, *et cetera*. Green's classification according to relationship is of little help in solving these problems. Thus, the same statement may injure both social and professional relations.¹⁴ The effect of a retraction does not vary with the relationship;¹⁵ nor does the relationship affect the question whether publication has been made¹⁶ or whether a telegraph company is liable for transmission.¹⁷ The same statement may injure professional and political relations.¹⁸ It is a strained meaning of "political relations" to include statements by an attorney in an application for a pardon,¹⁹ and newspaper reports of judicial proceedings.²⁰ Furthermore, it is legally immaterial whether a false statement injures professional relations or trade relations.²¹ The evil of the author's arrangement is demonstrated by the fact that an understanding of the most important defense—privilege—must be culled from various chapters instead of being identified in a manner to hold due attention.

The other cases dealing with family, social, professional, political and trade relations would have received the emphasis they deserve, had the defamation cases been segregated. The death statute cases are particularly valuable. The growing importance of the *consortium* problem is fully recognized. *Ashby v. White*—that classic of legal classics—is forgotten; but its place is taken by cases no less meaningful. The many interesting aspects of the *Olson* cases²²

¹⁴ *Zbyszko v. New York American, Inc.*, 228 App. Div. 277, 239 N. Y. Supp. 411 (1930); *Cole v. Millspaugh*, 111 Minn. 159, 126 N. W. 626 (1910).

¹⁵ *Webb v. Call Publishing Co.*, 173 Wis. 45, 180 N. W. 263 (1920); *Den Norske Amerielinje v. Sun Printing & Publishing Ass'n*, 226 N. Y. 1, 122 N. E. 463 (1919).

¹⁶ *Ostrowe v. Lee*, 256 N. Y. 36, 175 N. E. 505 (1931).

¹⁷ *Flynn v. Western Union Tel. Co.*, 199 Wis. 124, 225 N. W. 742 (1929).

¹⁸ *Clifford v. Cochrane*, 10 Ill. App. 570 (1882); *Wert v. Sprecher*, 82 Neb. 834, 118 N. W. 1071 (1908).

¹⁹ *Andrews v. Gardiner*, 224 N. Y. 440, 121 N. E. 341 (1918).

²⁰ *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 40 Atl. 864 (1898); see author's page 1544, and the cases succeeding this.

²¹ *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

²² *State ex rel. Olson v. Guilford*, 174 Minn. 457, 219 N. W. 770 (1928); *Near v. State of Minnesota ex rel. Olson*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

more than justify the twenty-four pages devoted to them. The Federal Trade Commission cases are extremely valuable. The reviewer was disappointed to find the all-important subject of trade disputes relegated to a mere footnote;²³ especially since fourteen pages of space are devoted to *Lumley v. Gye*, which invariably receives complete attention in courses upon contracts and equity.

An outstanding feature is the number of decisions by the New York Court of Appeals—and particularly the proportionate number of opinions by Cardozo. The volume is testimony of the influence of this bench and of this judge upon the judicial process. However, the cases reflect ample geographical diversification. At the risk of being deemed provincial, the reviewer admits that he had hoped to find more Pennsylvania cases; of those which are included, it is interesting to note the number and the value of the opinions by Kephart.

The book is replete with those cases which are the *sine qua non* of any casebook on torts: *Cole v. Turner*, *Fletcher v. Rylands*, *MacPherson v. Buick Motor Co.*, *Derry v. Peek*, *Glanzer v. Shepard*, *Talmage v. Smith* and tens of others. The author has not failed to add the newcomers which have already won a niche in the hall of fame: *Chapman v. Saddler & Co.*, *Ultramares Corp. v. Touche*, *Mahoney v. Beaman*, *Palsgraf v. Long Island R. R.*, and many others. He calls the attention of the reader to innumerable cases which hitherto have been comparatively unknown, but which are pointed and interesting. The number of "modern" cases is remarkable. The last decade is well represented, and the author demonstrates conclusively that the years of 1930 and 1931 were rich in the material that makes a good casebook upon the law of torts.

The footnotes are stimulating in character; the cases are well annotated with citations from the Restatement of the American Law Institute; the literature of legal periodicals is given due recognition. References are made at the appropriate points to practically all the writings of Bohlen. In many casebooks the footnotes are of little practical importance. However, by this device the present author really succeeds in arousing the intellectual curiosity of the student.

The reviewer will finally refer to the first chapter in the book. The author places the greatest stress upon it; he writes: "Nearly every idea employed by the judicial process appears here in one form or another. . . . If the student fails at this early stage to grasp something important, it is not fatal. Neither time nor power is lost by taking pains with this chapter."²⁴ The title of the chapter is in part self-explanatory: "Threats, Insults, Blows, Attacks, Wounds, Fights, Restraints, etc." By "etc.," Professor Green means consent, justification, excuse, self-defense, defense of third persons, privilege, protection of property, emotional disturbance due to negligence, etc. In other words, here the subject-matter suffers for lack of identification "so that the student can hold it in focus". The evil of being too general is as great as the evil of being too specific. The former extreme is reached not only in the first part of the book, and upon the subject of defamation, but also in the last.²⁵ The latter extreme is reached not only at points criticized above, but even within the first chapter; the section devoted to "Conduct with Reference to Women" includes *Spade v. Lynn & Boston R. Co.* and kindred cases. The judicial process in respect to liability for the physical consequences of emotional disturbance is not affected by the sex of the plaintiff.²⁶

²³ Page 1799.

²⁴ Page iv.

²⁵ Part Three is "Interests of Personality, Property, and in Relations with Others." The only topic under this is "Harms of Physical Impairment, Appropriation, and Defamation." However, the subject discussed is solely abuses of governmental power and process.

²⁶ In *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905) the decedent was male; also see *Fleming v. Lobel*, 59 Atl. 28 (N. J. 1904) wherein the plaintiff was a boy. For the nature of the judicial process respecting this problem, see Bohlen and Polikoff, *Liability in New York for Physical Consequences of Emotional Disturbance* (1932) 32 COL. L. REV. —.

In the last analysis, the great fault of the book is that the author purports to present material for study of the judicial process—but presents his own thoughts of what the courts should do, instead of answering his own inquiry as to how they actually do function. This is most evident in the complete absence of any section on "Cause". No matter what explanation may be attached to the use or misuse which courts make of theories of "proximate cause", the fact remains that such theories are a live and integral part of tort law. Granting that the judge decides tort responsibility by the process of first determining the desirable result in the light of social expediency and justice—granting that he speaks in terms of causation as a mere means to the end of giving an apology for following his judicial "hunch"—the reviewer submits that these theories deserve the attention of student and practitioner for what they are and for what they achieve. Whether a particular court discusses the ambit of tort liability in terms of negligence or in terms of causation, in a close case the judicial process must inevitably follow the course of the superior rationalization. Every day appellate judges are asked: How far will the consequences of the defendant's conduct be traced for the purpose of holding him liable? The number of dissenting opinions, and the number of conflicting decisions *upon identical fact patterns*, amply demonstrates that the question cannot be answered by focusing attention upon such details as the occupancy of land²⁷ or passenger transportation.²⁸ Such question is not answered by ignoring it.

As a casebook, the volume reads like a novel due to its interesting and pointed cases. However, the reviewer feels that it does not facilitate study of the judicial process; that the author's classification is faulty for this purpose; mainly, that comprehension of the nature of the judicial process cannot be developed by any good casebook more successfully than by another. One person can view the picture of a five-masted schooner and feel the thrill of a Masefield poem, while another sees mere wood and canvas.

Harry Polikoff.

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LAW AND LITERATURE AND OTHER ESSAYS. By Benjamin N. Cardozo. Harcourt, Brace & Company, New York, 1931. Pp. 190.

This latest publication of Judge Cardozo's is of especial significance at this time, representing as it does, the convictions of the man who has been appointed to fill the place of Justice Holmes. These essays by the spiritual successor of the great New Englander exhibit the grace and charm characteristic of all his writings, with the vision, learning and sympathetic insight for which he is so justly esteemed by his professional brethren on both sides of the Atlantic.

The first essay, from which the volume takes its title, "Law and Literature", disproves the fallacy of the idea that "a judicial opinion has no business to be literature". Parenthetically, his own opinions in adjudicated cases are proof positive that the best judicial pronouncements can be written with grace of diction. He affirms that form or literary style is essential, if the substance is to be properly expressed, and quotes the statement of the French novelist that the Code Napoleon is the one example of the perfect style, everything being subordinated to the exact and complete expression of the thought.

Judicial opinions may be divided into six classes: the magisterial, the laconic, the conversational or homely, the refined or artificial, the demonstrative, and the

²⁷ Andrews & Co. v. Kinsel, 114 Ga. 390, 40 S. E. 300 (1901); author's page 593.

²⁸ Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928); author's page 1054.

tonsorial or agglutinative, "so called from the shears and the pastepot which are its implements and emblem". The opinions of Marshall are cited as examples of the magisterial or imperative. In such opinions no tentative groupings or uncertainties appear, and little of illustration or analogy. "We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power." The same sure and calm conviction appears in many of the judgments of Lord Mansfield.

Today, however, the philosophy of the law has changed; its development is conceived of "as a process of adaptation and adjustment". This changing philosophy has developed a changing style. The laconic style of opinion is best exemplified by the English judges and by our own Mr. Justice Holmes. Of certain of Holmes' opinions, "the sluggard unable to keep pace with the swiftness of his thought will say that he is hard to follow. If that is so, it is only for the reason that he is walking with a giant's stride. He is one of the masters who are content to say, 'The elect will understand, there is no need to write for others'."

The tonsorial or agglutinative opinion is only too well known. "The dreary succession of quotations closes with a brief paragraph expressing a firm conviction." Happily this type is gradually disappearing.

In his essay, "A Ministry of Justice", the need for a permanent coördinating body to supervise the judicial administration is set forth. "The judges, left to fight anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain." On the other hand, the legislature, without the technical knowledge or advice as to the workings of any particular rule, "patches the fabric here and there, and mars often when it would mend. . . . Some agency must be found to mediate between them." In the countries of Continental Europe, this duty devolves upon the Minister of Justice, an executive officer. We, in this country, were without such an agency, until the advent of the Judicial Councils. Although the author does not mention these bodies by name, he argues for their establishment and recommends, not a group of judges only, but a body composed of judges, practicing lawyers, and professors of law. Such a body must include teachers of law from our universities, because, "hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test". Of the lawyers, he says: "We are sometimes slow, I fear, while absorbed in the practice of our profession, to find inequity and hardship in rules that laymen view with indignation and surprise. One can understand why this is so. We learned the rules in youth when we were students in the law schools. We have seen them reiterated and applied as truths that are fundamental and almost axiomatic. We have sometimes won cases by invoking them. We end by accepting them without question as part of the existing order. They no longer have the vividness and shock of revelation and discovery. There is need of conscious effort . . .". A ministry of justice, a judicial council, is the remedy suggested. Particularly is such an agency required if, as we lawyers so devoutly desire, the rule-making powers of our courts are to be restored to them.

"What Medicine Can Do For Law" is a discussion of the pressing problems of medico-legal jurisprudence, particularly with reference to the administration of criminal justice. "More and more we lawyers are awakening to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law." The worst blunders would have been avoided if the courts had possession of the fundamental, underlying facts. As an example, the statute of New York forbidding night work for women is cited; declared

unconstitutional in 1907, it was sustained eight years later by a court possessing "fuller knowledge of the investigations of scientists and social workers". The courts are continually asked to nullify legislation as an undue encroachment upon individual liberty. What is arbitrary and unreasonable can only be ascertained from a complete knowledge of the facts. "We do not turn to a body of esoteric legal doctrine, at least not invariably, to find the key to some novel problem of constitutional limitation. . . . We turn to physiology or embryology or chemistry or medicine—to a Jenner or a Pasteur or a Virchow or a Lister as freely and submissively as to a Blackstone or a Coke."

The suggestion that the power to fix the sentence of a convicted criminal should be withdrawn from the court and handed over to psychiatrists is mentioned, but approval thereof is not expressed. Support is given to measures requiring examinations of recidivists by qualified physicians who shall make their recommendations to the court before sentence is passed. The research of the endocrinologists has been useful, even though most of their conclusions are still in the stage of speculation. Perhaps, in the future, the criminal "will have fewer homilies and exhortations, but will have doses of thyroxin or adrenalin till his being is transfigured".

The reform of the individual criminal is one of the purposes of an enlightened administration of criminal law. However, its principal function is the protection of society and as a deterrent to unsocial activity. The phrase, the "King's Peace", is but the expression of the demand that public punishment be substituted for private vengeance. The blood feud and the vendetta have been outlawed; nevertheless, "the thirst for vengeance is a very real, even if it be a hideous, thing; and states may not ignore it till humanity has been raised to greater heights than any that have yet been scaled". The sanctions of the criminal law have had much to do with the ignominy—the sense of community shame—attached to the lawbreaker.

There are many glaring defects in our penology. "The casual offender expiates his offense in the company of defectives and recidivists, and after devastating years is given back an outcast to the society that made him. The defective or recidivist, whose redemption is hopeless, goes back after a like term, or one not greatly different, to renew his life of crime, unable to escape it without escaping from himself." Psychology and medicine have not yet demonstrated that a revolution in our system of punishment is advisable. We must feel our way slowly. Without doubt, "a century or less from now, our descendants will look back upon the penal system of today with the same surprise and horror that fill our minds when we are told that only about a century ago one hundred and sixty crimes were visited under English law with the punishment of death, and that in 1801 a child of thirteen was hanged at Tyburn 'for the larceny of a spoon'. Nevertheless, many improvements have been made in recent years, particularly in the treatment of juvenile delinquents, and the methods there applied "will spread to other fields".

There is a particular need for the restatement of the law of homicide. The distinction between murder in the first and in the second degree "is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words."

The definition of insanity as an excuse for crime is utterly inadequate, "and has no relation to the truths of mental life". The problem of framing a definition "that will not be so broad as to open the door to evasion and imposture" is most difficult; perhaps the risk involved in broadening this defense is too great to warrant a change. As a result of the irresistible impulse doctrine of many

of our states, "the administration of the criminal law has suffered". In any event, "much of the danger might be obviated if the issue of insanity were triable by a specially constituted tribunal rather than the usual jury". In this connection, a word of encouragement might well have been given to those who are endeavoring to mitigate the evils growing out of "expert" medical testimony in homicide cases.

Cardozo's legal philosophy is characteristically expressed in this essay. After quoting Mr. Justice Brandeis' phrase that "it is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen", he states: "In case of doubt I have a leaning, which is not always shared by others, toward the impressionism that suggests and illumines without defining and imprisoning. . . . What I fear is a pseudo-science which has assurance without conviction."

The author's discussion of the work of the American Law Institute is most suggestive. He likens the common law to a coat: "The body that it was meant to shield has grown; and we have been brought up in the faith that the coat would grow too. So, indeed, it seems to have done. . . . Even now with all the wear and tear, it is still a good coat, far too good to be thrown away, though the stretching and the shrinking have not been uniform throughout. . . . Let us make it over as reverently as our fathers made it for us and hand it down to our descendants." The restatements of the Institute should help to solve "the age-long problem of uniting flexibility to certainty, that will give us the virtues of a code without the blighting pretension to literal inerrancy. . . ." The methods adopted for full discussion by the leaders of the profession make it possible to "supply checks on one another, justice and utility putting us on the scent, so to speak, to discover and unearth what is spurious in logic". Although the Institute "is a declaration to the world that 'laissez faire' in law is going or has gone the way of 'laissez faire' in economics", we must be on our guard that too much is not attempted, and that we should not give "definiteness and assurance and finality in fields where . . . finality must be left to the agency of time. . . . Something will have to be left . . . to those tentative gropings, those cautious experiments, those provisional hypotheses, that are part of the judicial process".

J. Wesley McWilliams.

Philadelphia, Pa.

CASES AND OTHER MATERIALS ON THE LAW OF INSURANCE. By George W. Goble. Indianapolis: Bobbs-Merrill Company, 1931. Pp. xxix, 898.

Mr. Goble makes a departure from the usual arrangement of material adopted in other insurance casebooks. His thesis is that personal and property insurance involve problems which are sufficiently different to justify and demand a separate development of each. He therefore devotes Part I of his book to a treatment of life and accident insurance and Part II to property insurance. There is not a complete intermingling of the material on the various types of insurance under the older casebooks: doctrinal classifications are made, but there is usually separate treatment of each branch of insurance under the various classifications. For example, the subject of insurable interest is not developed by an indiscriminate mixing of life and property insurance cases, but separate sections of the "insurable interest" chapter are devoted to "insurable interest in life" and to "insurable interest in property." While comparisons upon certain points in life and property insurance are valuable, it is doubtful whether the conventional casebook treatment aids much in making such com-

parisons, because separate developments under the general classifications is almost necessary. Furthermore a great deal of the material under the general classifications is not comparable.

This separate treatment of personal and property insurance is abandoned in one instance. Waiver and estoppel in both fire and life insurance are treated together, because of the similarity of the problems under the two types of insurance. Separate development of waiver and estoppel for personal and property insurance would involve unnecessary duplication. The abandonment of the orthodox treatment of waiver and estoppel as a general doctrine, and the adoption of a plan of distribution of the waiver and estoppel material among the various topics as "iron-safe clause" and "sole and unconditional ownership," would give a picture more nearly corresponding with the knowledge which will be needed in practice, but such treatment probably would prove impractical for classroom purposes because of the repetition which would be involved.

The general arrangement of material under each type of insurance is the same. The editor chooses to begin with the creation of the relation of insurer and insured, and proceeds with representations, warranties, waiver, estoppel, through the rights of the insured and beneficiary, to facts operating to mature the policy. Part I on personal insurance contains in addition a chapter on the different methods of payment of the insurance proceeds to the beneficiary under a life policy. The classification in Part I of "Facts Operating to Mature the Policy" includes matters such as suicide and death by legal execution, which in other casebooks have been given individual treatment as implied warranties, and in addition includes such matters as death in military service and death in aviation, which other casebooks classify under either a treatment of the various terms of the policy or under waiver. Part II on property insurance deals largely with fire insurance, but also contains some material upon marine, theft, embezzlement, burglary, liability and automobile collision insurance.

In line with modern movements in casebook construction, the editor uses materials on economic and business phases of the subject, legal writings, especially quotations from law review articles, and problem cases in addition to the regular form of annotations. However, by far the greatest portion of the material is composed of cases. The extra-legal materials, although relatively small in quantity, help to give the student a thorough understanding of phases of insurance business and practice which he cannot get from the cases.

The deficiencies of the case system have long been recognized, but concerted efforts to remedy them are of rather recent origin. At least some of the old casebooks give one the impression that the editor, through affliction with an inductivity complex, is attempting to hide something from the student, for fear that thought will be dampened by knowledge. Otherwise the casebook's meager materials for thought are difficult to explain. An increase in the scope of material covered by using economic and legal writings is just one of the needed improvements which appear in the newer casebooks. Many of the early casebooks suffer from faulty editing. Long cases embodying a mass of irrelevant material in the form of repetitious quotations from other cases and extended historical discussions of the development of the problem within a particular jurisdiction characterize some casebooks. Such long cases depress critical thinking, and are as harmful as the "quotation opinions" which give no facts as to the procedure of the case, and consequently make it impossible to ascertain the actual holding.

A number of the principal cases are supplemented with valuable footnotes. These notes take many different forms: problem cases, standard casebook notes, quotations from legal periodical material, mere references to authority, analyses of problems in Hohfeldian terminology, aids to the student in the

form of warnings to consider the different types of important factual situations which arise in connection with a problem, questions to the student, and numerous valuable references to legal periodical literature. A compilation of the articles and notes cited in the book, follows the table of cases. An inaccuracy appears in the footnote on page 853, where the editor lists the decision of the Sixth Circuit Court of Appeals in *United States Fidelity etc. Co. v. Guenther*¹ as holding that a municipal ordinance fixing eighteen as the age limit for operating automobiles is not a "law" within the provision of a liability policy excepting the insurer from liability where the automobile is operated by one under the age "fixed by law." The decision was reversed by the United States Supreme Court.²

Statutes are playing an important part in the development of the law of insurance. The statutes abolishing warranties in fire and life insurance make insurance a more effective social agency for risk distribution by relieving it from strict rules which develop under early marine insurance. The Missouri statute³ which requires contribution to loss to avoid a life insurance policy on the ground of misrepresentation, is designed to offer the most extensive protection to the beneficiary. The fire insurance statutes of some states are framed to give a high degree of protection to the insured against avoidance of the policy by misrepresentation or breach of warranties and conditions.⁴ It is gratifying to find that the present work contains numerous references (usually in the footnotes) to these statutes which show the changing conceptions in insurance law, but it is believed that a greater use could have been made of the statutory materials.

While the separate treatment of personal and property insurance is a departure in the arrangement of subject matter, the development of the various topics is largely upon conventional lines. The innovations in the form of excerpts from legal and economic materials are valuable features. The cases are carefully selected and well edited. The book is an excellent work which merits the attention of the teacher of insurance.

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THE STORY OF MY LIFE. By Clarence Darrow. Charles Scribner's Sons, New York, 1932. Pp. viii, 465.

This might have been a book comparable with the *Experiences* of Serjeant Ballantine or the more recent life of Sir Edward Marshall Hall:¹ many readers will be disappointed at its failure to realize that possibility. But to Darrow the technique of legal advocacy lacks commanding importance; "whether", he writes, "I am an able lawyer or not I do not know or care".² He is more interested in

¹ 31 F. (2d) 919 (C. C. A. 6th, 1929).

² *United States Fidelity & Guaranty Company v. Guenther*, 281 U. S. 34, 50 Sup. Ct. 165 (1929).

³ Mo. REV. STAT. (1929) § 5732. See (1930) 5 TULANE L. REV. 147 (federal case interpreting a contribution to loss statute).

⁴ For example, see Act 222 of 1928 of Louisiana which provides ". . . no policy of fire insurance . . . shall hereafter be declared void by the insurer for the breach of any representation, warranty or condition . . . unless such breach shall exist at the time of the loss and shall be either such a breach as would increase either the moral hazard or physical hazard under the policy,"

¹ *For the Defence—the Life of Sir Edward Marshall Hall*, by Edward Majoribanks; reviewed (1930) 78 U. OF PA. L. REV. 680. For an account of Darrow's legal career from a third person's view, see *Clarence Darrow*, by Charles Yale Harrison (1931).

² P. 426.

ultimate implications, and prefers to present in considerable detail his philosophy of life and death—a philosophy kindly, courageous in facing the worst, depressing or encouraging according to the reader's own character and viewpoint, but certainly containing little novelty or fresh interest for educated men. This kind of thing is talked ragged on many a college campus (always excepting that of Bryan University!) And, to tell the truth, whether Darrow realizes it or not he is too much the advocate to be a reliable philosopher. His diatribe against prohibition³ deserves attention as a piece of good rough and tumble argumentation, persuasion, and incitement. But it utterly ignores the real benefits derived from even the hopelessly insincere and faulty prohibition act under which we are living. In connection with his soundly stimulating suggestions about the treatment of criminals, the author states: "As a rule, there is little love and less understanding between parent and child."⁴ Perhaps so: but Darrow does not know this; nobody knows it; it is a recklessly hasty generalization. A few pages later comes: "All the European and Asiatic countries are made up of a homogeneous people."⁵ It would be insulting to the author's obviously well informed mind to suppose that if he were really philosophizing instead of "sputifying", he would not promptly reject, or at least qualify, this assertion, and doubt any conclusions derived from it.

Hence one may well wish that Darrow had leaned more toward an objective presentation of his life, had devoted himself to describing the almost uniquely varied and interesting human encounters with which his days have been replete. The pages touching this topic hold tantalizing fascination. Some incidents are famous: the Chicago anarchist case of the eighties; the Moyer-Haywood-Pettibone cases; McNamara; Loeb and Leopold; the Scopes "evolution case". But for vivid drama and poignancy the chapter on George Bissett,⁶ who stole because he "wanted to start a Socialist paper, and, as he had no education . . . could never get the necessary money by working", stands out beyond the others. The paths of this client and his lawyer friend crossed again and again; each was loyal to the other; Bissett's loyalty, indeed, would, but for Darrow's dissuasion, have carried him to the point of dynamiting a man whom he regarded as Darrow's enemy. It is hard not to believe that a wiser social order might have made something of George Bissett. Doubtless our author could give us many more such arresting human records, if he saw fit to do so.

But take the book as it is: largely a provocative argument calling for constant rebuttal and correction rather than placid acceptance. Surely lawyer readers are well equipped to meet its challenges. They will find plenty in their own chosen field. Do trial judges permit profoundly unfair prejudice to be created by slackening the rules of evidence in conspiracy cases?⁷ Are prosecutors commonly allowed on *voir dire* to disqualify prospective jurors by trick questions?⁸ Is unreliable identification evidence habitually given too much weight?⁹ Is every sensational criminal trial "a man-hunt where the object of the pack is to get their prey"?¹⁰ Is there a Lawyers' Union "about as anxious to encourage competition as the Plumbers' Union is, or the United States Steel Co., or the American Medical Association"?¹¹ Are lawyers displaying such narrowness,

³ Pp. 284-300.

⁴ P. 346.

⁵ P. 365.

⁶ Pp. 192-202.

⁷ This is charged on pp. 64 and 144 *et seq.*; cf. 122-123.

⁸ P. 147.

⁹ P. 206.

¹⁰ Darrow makes this assertion in even more extreme form, including commonplace trials as well, p. 332. He seems to be generalizing from his own experience in very difficult cases. See p. 425.

¹¹ P. 29.

dilatoriness, and disregard of general public interest that business men turn away from them and the courts they serve? ¹² Has the law, the only "science" in which men have power to dictate and alter fundamental rules, lagged miserably behind all other scientific advance? ¹³

Through this acid questioning, through the whole argument of an unevenly written and somewhat disjointed book, the reader receives a definite and favorable impression of Darrow himself. He is not drawn to the discharge of his legal duty by hope of material reward, nor repelled even by the impossibility of adequate compensation. He fights what seems to him a meritorious \$30 case for eight or nine years, and wins it; ¹⁴ he later emerges from prolonged painful litigation actually in debt, but refusing to take his full fee from distressed clients. ¹⁵ Perhaps the best remark in the book, from a literary point of view, runs: "I have never killed any one, but I have read some obituary notices with great satisfaction." ¹⁶ Really, though, this is quite out of character—even the heat of contentious litigation has not seared away Darrow's kindness. He finds it nearly impossible to speak harshly of any specific person. A sentence better illustrating his fundamentally sympathetic attitude is: "I had learned to rather like him, just as we learn to like most people when we really know them." ¹⁷ But he could not be entirely kindly to Bryan, in the latter's ultimate anti-evolutionary manifestations. ¹⁸ Darrow says he prefers good straightforward fighting to technicalism, ¹⁹ and his summaries of simple, honest defences bear out this statement. ²⁰ He takes for granted the obligation of courage and fidelity. A classic story of faithful advocacy tells how Thorhall, Asgrim's son, the third greatest lawyer in Iceland, was incapacitated by a huge boil or infection in one leg when a vitally important case came on for trial. Lying in his booth, he shrewdly advised his clients by messenger and steered them past several difficulties. But at last came word that they had tripped over one of the subtleties with which Icelandic law abounded, and stood in peril of outlawry. Up leaped Thorhall off his bed, speechless from shock, lanced his boil with a spear, hastened unhalting to the court, and precipitated a free for all fight which entirely changed the upshot of the litigation. How this bluff old legend pales beside the action of Darrow in two successive murder cases, where he tried for weeks on end in intense pain, risking his life to save his clients, breaking off only when he was too weak to stand and success had been reasonably assured! ²¹ In him, the staunch legal traditions have not died.

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FEDERAL PRACTICE. By William J. Hughes (assisted by George C. Thorpe). West Publishing Co., St. Paul, 1931. 16 Volumes.

A new and comprehensive work on federal practice, jurisdiction and procedure is now accessible to the legal profession. The author of this monumental work has been for more than forty-six years associated with the Federal Depart-

¹² Pp. 330-331.

¹³ Pp. 430-431.

¹⁴ Pp. 34-35. Darrow values the bone of contention at \$15, but the report accords with the text above. *Brockway v. Jewell*, 52 Ohio St. 187, 39 N. E. 470 (1894).

¹⁵ P. 171.

¹⁶ P. 86.

¹⁷ P. 195.

¹⁸ Pp. 250, 267, 277.

¹⁹ Pp. 426-427.

²⁰ See, for instance, p. 194.

²¹ Pp. 157 *et seq.*

ment of Justice. He is still serving as attorney in the office of the Solicitor General, and has long been the recognized authority of the Department with respect to the subjects embraced by these volumes. Many changes and amendments to the statutes and rules of federal practice have necessitated a definite and up-to-date exposition of the subject: the work is complete in this respect and its arrangement is one which should lend itself to ready use.

Of the 16 volumes, 13 have been issued and the other 3 are in the course of preparation and will be issued soon. The first 9 volumes cover the thousands of procedural and jurisdictional questions. Matters in which the correct procedure has been in doubt have now been made clear by this master of the subject; matters relating to the highly specialized practice in, and jurisdiction of, the Admiralty and Bankruptcy Courts, the Court of Customs and Patent Appeals, the Court of Claims, the Federal Courts in Hawaii, Porto Rico, Virgin Islands, Alaska, Canal Zone, China, and Consular Courts, and the Jurisdiction of District Courts in civil suits at Law and in Equity are very ably and comprehensively covered.

Probably the most important volume of all is the fourth (of 466 pages) devoted entirely to the removal of causes. There is also included with this work a most unique and valuable chart, which shows the judicial system of the United States, with the relation of the courts to each other. It shows the nature of the jurisdiction and the mode and proper tribunal of review, by appeal, certiorari, etc.

Another outstanding feature of this treatise is the treatment of certiorari from the Supreme Court of the United States. It is the outstanding work on this subject. The reasons are given which lead the Supreme Court to grant or deny petitions for certiorari. The number of these petitions presented to the court each year is very large, having increased because of the Act of Congress of February 16, 1925.

The tenth volume is a table of cases cited in the previous nine volumes; the eleventh volume is an index with adequate references to the text; volumes twelve and thirteen are devoted to forms in suits in equity. Volumes fourteen and fifteen are given over to forms in actions at law, admiralty, bankruptcy, on appeal, etc., while the last volume is an index to the volumes of forms.

Former Attorney General George W. Wickersham, born in Pennsylvania and an alumnus of the University of Pennsylvania Law School, former Solicitor General James M. Beck, born in Philadelphia and now a representative of Philadelphia in Congress, and former Solicitor General John W. Davis, have written forewords in which they severally set forth the unique qualifications of the author to write an authoritative work on Federal Practice and also praise the merits of the work. The work is a necessary and adequate one for the use of practitioners in the Federal Courts.

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BOOKS RECEIVED

- ADMINISTRATIVE CONTROL OF ALIENS, THE. By William C. Van Vleck. The Commonwealth Fund, New York, 1932. Pp. x, 260.
- ANNUAIRE INTERNATIONALE DE LEGISLATION AGRICOLE. Institute International D'Agriculture, Rome, 1931. Pp. lxxxvi, 1151.
- CASES ON ADMINISTRATIVE LAW. By Felix Frankfurter and J. Forrester Davison. Commerce Clearing House, Inc., New York, 1932. Pp. xv, 1177.
- CASES ON BILLS AND NOTES. (Second Edition.) By William Everett Britton. Callaghan and Co., Chicago, 1932. Pp. xxii, 755.
- CASES ON BILLS AND NOTES. (Third Edition.) By Howard L. Smith and Underhill Moore. West Publishing Co., St. Paul, Minn., 1932. Pp. xiii, 967.
- CASES ON BISPHAM'S EQUITY. By Joseph D. McCoy. Baker, Voorhis & Co., New York City, 1931. Pp. xi, 866.
- CASES ON CREDITORS' RIGHTS. By John Hanna. Commerce Clearing House, Inc., New York, 1931. Pp. xvii, 1076.
- CASES ON DAMAGES. (Second Edition.) By Ralph Stanley Bauer. Callaghan and Co., Chicago, 1932. Pp. xxi, 739.
- CASES ON EQUITY. By Sidney Earle Smith and Horace Emerson Read. Burroughs & Co., Toronto, 1931. Pp. xiii, 685.
- CASES ON SURETYSHIP. By Morton Carlisle Campbell. Published by the editor, Langdell Hall, Cambridge, Mass., 1931. Pp. viii, 534.
- CASES ON TAXATION. (Second Edition.) By Henry Rottschaefer. Callaghan and Co., Chicago, 1932. Pp. xxv, 648.
- CASES ON TITLES. (Second Edition.) By Ralph W. Aigler. West Publishing Co., St. Paul, Minn., 1932. Pp. xiv, 1031.
- COURTS AND DOCTORS. By Lloyd Paul Stryker. Macmillan Co., New York, 1932. Pp. xxv, 236.
- HOURS OF LABOR. By Lazare Teper. Baltimore: The Johns Hopkins Press, 1932. Pp. 92.
- INTERNATIONAL LEGISLATION. Edited by Manley O. Hudson. Carnegie Endowment for International Peace, Washington, 1931. Pp. cxviii, 786 (vol. 1), xix, 758 (vol. 2).
- JUDICIAL DISCRETION OF TRIAL COURTS, THE. By Renzo D. Bowers. Indianapolis: Bobbs Merrill Co., 1931. Pp. lxxii, 651.
- JUDICIAL PROCESS IN TORT CASES, THE. By Leon Green. West Publishing Co., St. Paul, Minn., 1931. Pp. xx, 1900.
- LAW OF PATENTS FOR CHEMISTS, THE. By Joseph Rossman. The Inventors Publishing Co., Washington, D. C., 1932. Pp. ix, 304.
- LAW OF STOCK BROKERS AND STOCK EXCHANGES. By Charles H. Meyer. Baker, Voorhis & Co., New York, 1931. Pp. lvii, 1493.
- LOOKING FORWARD—WHAT WILL THE AMERICAN PEOPLE DO ABOUT IT? By Nicholas Murray Butler. Scribner's, New York, 1932. Pp. xiv, 418.
- SOME ASPECTS OF THE THEORIES AND WORKINGS OF INTERNATIONAL LAW. By W. P. M. Kennedy. The Macmillan Co., New York, 1932. Pp. xiv, 142.
- STORY OF MY LIFE, THE. By Clarence Darrow. Scribner's, New York, 1932. Pp. viii, 457.
- STUDY OF THE JUDICIAL SYSTEM OF MARYLAND—DIVORCE LAW IN MARYLAND. By Geoffrey May. Baltimore: The Johns Hopkins Press, 1932. Pp. 53.
- WOMEN'S MISDEMEANANT'S DIVISION OF THE MUNICIPAL COURT OF PHILADELPHIA. Thomas Skelton Harrison Foundation, Philadelphia, 1932. Pp. xix, 310.